No. 2441.

United States
Circuit Court of Appeals
For the Ninth Circuit.

APPELLANT'S BRIEF.

TENABO MINING AND SMELTING COMPANY, a Corporation,

Appellant,

vs.

CHARLES D. BATES,

Appellee.

Upon Appeal from the United States District Court for the District of Nevada.

BURDETTE, SALT LAKE

United States
Circuit Court of Appeals
For the Ninth Circuit.

No. 2441.

APPELLANT'S BRIEF.

TENABO MINING AND SMELTING COMPANY, a Corporation,

Appellant,

vs.

CHARLES D. BATES,

Appellee.

Upon Appeal from the United States District Court for the District of Nevada.

STATEMENT OF THE CASE.

This was a suit in equity tried in the Circuit court of the United States, Ninth Circuit, district of Nevada, upon the issues framed in the following complaint and answer, wherein Charles D. Bates was complainant and the Tenabo Mining & Smelting Company was defendant.

(Bill of Complaint, Filed October 2, 1911.)

To the Honorable Judges of the Circuit Court of the United States for the Ninth Judicial Circuit, District of Nevada:

Charles D. Bates, in behalf of himself and all other stockholders of the defendant Tenabo Mining and Smelting Company, who are similarly situated and who wish to join in this bill and bear their proportion of the expenses of this suit and become parties thereto, brings this, his bill of complaint, against the above-named defendant, and for cause of complaint your orator says:

I.

That he is a resident and citizen of the State of Utah, residing at Salt Lake City, in said State; that the defendant Tenabo Mining and Smelting Company, a corporation, is a corporation organized and existing under and pursuant to the laws of the State of Nevada, and is a resident and citizen of said State.

II.

Your orator says that he is now and has been since the incorporation of the defendant company, a *bona fide* stockholder thereof, owning and holding two hundred shares of its capital stock.

III.

Your orator further says that the subject matter of this suit is of a cash value exceeding two thousand dol-

lars and that this suit is not a collusive one to confer on this court jurisdiction of a case of which it would not otherwise have cognizance.

IV.

Your orator further says that the defendant was incorporated under the laws of the State of Nevada, on November 14, 1908, for the purpose of acquiring, owning and operating mining claims and mining property, and conducting a general mining business, with a capital stock of three million dollars, divided into one million five hundred thousand shares, of the par value of two dollars each, of which said amount three hundred thousand shares were issued to the Tenabo Consolidated Mines Company and four hundred and fifty thousand shares were issued to the Gem Consolidated Mining Company in payment of the purchase price of the mining claims hereinafter mentioned, and seven hundred and fifty thousand shares were placed in the treasury of the said company as treasury stock thereof.

V.

That immediately after the incorporation of the defendant company and in consideration of the transfer to it of three hundred thousand shares of the capital stock of the defendant company, the Tenabo Consolidated Mines Company conveyed to the defendant the following mining claims, to-wit: Two Widows, Two Widows Extension, Copper Hill Group and Nevada Phoenix; and

in consideration of the transfer to it as above stated of four hundred and fifty thousand shares of the defendant company, the Gem Consolidated Mining Company transferred to the defendant the mining claims known as Little Gem, Ollie, Reno, and Winnemucca; all of which said mining claims are located in Lander County, Nevada. That at the time of the transfer of the said property from the Gem Consolidated Mining Company the same were incumbered with a mortgage of fifteen thousand dollars.

VI.

That during November and December, 1908, and during the year 1909, the defendant company caused to be sold and disposed of from the treasury of said company, about three hundred thousand shares of its treasury stock, the exact amount thereof being to your orator unknown, for the sum of about twenty-seven thousand dollars, the exact amount of which said sum is to your orator likewise unknown; that the only source of income which the defendant has had has been from the sale of its treasury stock, the said mining claims being undeveloped property and yielding no income whatsoever.

VII.

That in the year 1908, by reason of the failure of the defendant company to pay the mortgage due and owing as hereinabove set forth, the same was foreclosed, but before the sale of the said property under said foreclosure

proceedings, sufficient funds were realized from the sale of treasury stock with which to pay the said mortgage and the accrued interest and expenses thereof, which aggregated approximately twenty thousand dollars, the exact amount being to your orator unknown.

VIII.

Your orator is informed and believes, and therefore alleges the fact to be, that for more than two years last past, the defendant has had no income whatsoever. That it has been totally without funds. That on December 13th, 1910, it was obliged to borrow fifteen hundred dollars from one W. H. Sherman, with which to pay for the assessment work upon the said mining claims, and that to secure the payment of the said money so borrowed, it executed a mortgage to the said Sherman upon all its property and assets, which said mortgage, as your orator is informed and believes, is now due and unpaid; that all the money realized from the sale of the capital stock of the defendant company has been expended in the payment of obligations which were just and due, together with the payment of certain fees and allowances to the officers and board of directors of the defendant company.

IX.

That owing to the undeveloped condition of the property of the defendant and the incumbrance thereon, and the impecunious condition of the defendant, the four

hundred and fifty thousand shares of treasury stock yet remaining with the company has no market value and nothing can be realized thereon; that the assessment work for 1911 has not yet been performed and the defendant company has no money with which to pay for the same. That there are many obligations now due and owing from the defendant company to various creditors, and the defendants is in imminent danger of having instituted a multiplicity of suits against it, and its property and assets dissipated. That the officers and agents of the defendant company have acknowledged openly and repeatedly that it is insolvent. Your orator is informed and believes that said mortgage is about to be foreclosed upon said property, in which event, all of the assets of the said defendant company would be sold for the payment thereof and the unsecured creditors left without resource for the payment of their claims. That the defendant is insolvent.

X.

Your orator further says that the defendant company has never been a going concern in any proper sense thereof, as defined and specified in its articles of incorporation. That from the beginning, the only business that it has transacted was to do the necessary assessment work upon its mining prospects for the years 1909 and 1910, and to attempt to sell its treasury stock and make application of the proceeds therefrom.

IX.

Your orator further says that the present board of directors or those whom they represent by proxy or other appointment hold a majority of the capital stock of the defendant company and have so held said control since the incorporation thereof. That the affairs of said company have been grossly mismanaged in the following particulars, to-wit: That beginning two months after the incorporation of the defendant company, it contracted to and did pay as long as it had funds, to its board of directors and certain other officers and agents, a stipulated monthly salary, notwithstanding the fact that said board of directors and officers and agents performed little or no service for the said defendant company; that in the sale of said three hundred thousand shares of treasury stock, or thereabouts, it paid grossly inadequate commissions either to those who were then upon the board of directors or to others who held large and controlling stock interests in said company; that in making on March 15th, 1910, with one Pepton B. Locker and with one John Janney, the former of whom was a heavy stockholder and the latter of whom was the Secretary of the defendant company, a contract for the sale of all the treasury stock of the defendant company upon a basis that promised to yield to the company no return whatsoever; that in making no provision for the payment of the mortgage now due and owing upon the said property; for making no provision whatsoever for the payment of any of the

just obligations due and owing by the defendant, and in keeping no adequate books of account showing the financial transactions of the defendant company.

X.

Your orator further says that owing to the insolvency of the company and the mismanagement thereof, he has no plain, speedy and adequate remedy at law.

IN CONSIDERATION WHEREOF, and as your orator can have no adequate relief except in this court, and to the end, therefore, that the defendant, if it can, show why your orator should not have the relief herein prayed, and make a full disclosure and discovery of all the matters aforesaid according to the best and utmost of its knowledge, information and belief, full, true, correct and perfect answer make to all the matters herein stated and charged, but not under oath, answer under oath being hereby expressly waived, your orator prays:

1. That a receiver be appointed by this court to take charge of all of the assets of said corporation located within the State of Nevada, including all books, records, papers and documents of every name, nature and description, and sell and dispose of all the property and assets of the said defendant company under the guidance and direction of this court, and wind up the affairs of the company, and from the proceeds derived from the sale thereof, pay the expenses of said receivership, including a reasonable allowance of as solicitors' fees for

the bringing of this complaint, and distribute the balance to the stockholders of the defendant as their interests may appear.

2. Your orator further prays for such other and further relief in the premises as may be just and agreeable to equity.

MAY IT PLEASE YOUR HONORS to grant to your orator a writ of subpoena to be directed to the said defendant Tenabo Mining and Smelting Company, commanding it at a time certain, and under a penalty therein to be limited to personally appear before this Honorable Court, and then and there, full, true, direct and perfect answer make to all and singular the premises; to state, perform and abide by such order, direction and decree as may be made against it in the premises, and shall seem meet and agreeable to equity.

ANSWER TO ORIGINAL BILL OF COMPLAINT.

The answer of Tenabo Mining & Smelting Company, defendant, to the bill of complaint of Charles D. Bates, complainant:

This defendant now and at all times hereafter saving to itself all and all manner of benefit for advantage, exception or otherwise that can be made to, had or taken to the many errors, uncertainties, imperfections in said bill contained for answer thereto or to so much thereof

as this defendant is advised it is material or necessary for it to make answer to, answering:

1. Denies that this suit is not a collusive one to confer on said court jurisdiction of an action of which it would not otherwise have cognizance of.

2. Admits that the defendant corporation was incorporated under the laws of the State of Nevada, on November 14th, 1908, for the purposes, among others, of acquiring, owning and operating mining claims and mining properties, and conducting a general mining business, with a capital stock of three million dollars divided into one million million five hundred thousand shares of the par value of two dollars each, of which said amount three hundred thousand shares were issued to the Tenabo Consolidated Mines Company and four hundred and fifty thousand shares were issued to the Gem Consolidated Mining Company in payment for the purchase price of its mining claims. Admits that seven hundred and fifty thousand shares of the capital stock of said company were placed in the treasury of said company as treasury stock thereof, and this defendant states that the directors of said company were under the articles of incorporation and by-laws thereof, authorized to sell said treasury stock, or such portion thereof as in the discretion of said board of directors shall deem for the best interests of the corporation for the purpose of creating funds wherewith to transact the business and business af-

fairs of said corporation, and that 167,250 shares of said treasury stock is all of the same that has been sold and that the remaining portion thereof remains in the treasury of said corporation subject to sale.

3. Admits that immediately after the incorporation of said defendant company, the Tenabo Consolidated Mines Co., in consideration of the transfer to it of three hundred thousand shares of the capital stock of the defendant corporation conveyed to said defendant corporation all of its right, title and interest in and to the following named lode mining claims, situate in the Bullion Mining District, Lander County, Nevada, to-wit: Two Widows, Two Widows Extension and Copper Hill, and also all its right, title and interest in and to a certain bond and lease upon the Nevada Phoenix group of mining claims situate in the same mining district and the Gem Consolidated Mining Company, in consideration of four hundred and fifty thousand shares of the capital stock of the defendant corporation, transferred to the defendant corporation all of its right, title and interest in all of the Little Gem lode mining claim and also all of its right, title and interest in and to certain contracts and deeds in escrow for the acquisition of the location title to the Ollie, Reno and Winnemucca lode mining claims situated in the same mining district; but this defendant denies that at the time of said transfer any of said mining claims conveyed by said Gem Consolidated Mining Company other than

the Little Gem were encumbered with a mortgage in the sum of fifteen thousand dollars or any other sum whatsoever, and further, this defendant states that in the month of October, 1907, the Reliance Mining & Milling Company, being then the owner of the location title to the said Little Gem lode mining claim, executed and delivered a mortgage upon said mining claim to McCornick & Co. of Salt Lake City, Utah, to secure the payment of a note in the sum of fifteen thousand dollars, executed by Reliance Mining & Milling Company as maker and payable to McCornick & Co. as payee; that thereafter the said Reliance Mining & Millling Company conveyed all of its right, title and interest in and to said mining claim to the Gem Consolidated Mining Company and that in the month of October, 1908, said promissory note not having been paid, suit was instituted by McCornick & Co. in the Third Judicial District Court of the State of Nevada in and for the County of Lander against the Reliance Mining & Milling Company to foreclose said mortgage and at the time of the transfer by said Gem Consolidated Mining Company of all of its right, title and interest in and to said Little Gem lode mining claim to said defendant corporation, said note had not been paid and said suit for the foreclosure of the mortgage given to secure the said note was then pending and undisposed of in the court in which it had been instituted and said transfer was made by said Gem Consolidated Mining

Company and accepted by this defendant corporation subject to the lien of said mortgage.

4. This defendant admits that during the months of November and December, 1908, and during the year 1909, the defendant company caused to be sold and dispose of from the treasury of said company 167,250 shares of its capital stock; but denies that said company during said year or thereafter, or at all, sold and disposed of three hundred thousand shares of its treasury stock or any amount in excess of 167,250 shares, and this defendant admits that for the sale of said shares of treasury stock it realized the sum of $26,687.50. This defendant admits that the only source of income which the defendant has had has been from the sale of its treasury stock, but denies that said mining claims are undeveloped property, but admits that up to the present time the same have yielded no income whatever, but this defendant states that prior to the time when the above described mining claims were conveyed by the Tenabo Consolidated Mines Company and the Gem Consolidated Mining Company to this defendant much development work had been done upon the same and large deposits of milling ore had been developed thereon in, to-wit: more than seventeen thousand tons of a net value in excess of $171,000.00.

5. Denies that in the year 1908, or at any other time or at all, by reason of the failure of the defendant company to pay the mortgage due and owing as set forth in

plaintiff's complaint, the same was foreclosed, but, on the contrary, this defendant states that the proceeding to foreclose said mortgage had been instituted and was pending at the time of the conveyance by the Gem Consolidated Mining Company of the Little Gem, Ollie, Reno and Winnemucca lode mining claims to this defendant corporation, but this defendant admits that before the sale of said property under said foreclosure proceedings and before final hearing upon said proceedings sufficient funds were realized from the sale of treasury stock by said defendant corporation with which to pay the indebtedness secured by said mortgage and to procure a release of said mortgage, but this defendant denies that said indebtedness at the time of the payment thereof exceeded the sum of $19,885.45.

6. This defendant admits that for more than two years last past said defendant has had no income whatever, but denies that it has been without funds. Admits that on December 13, 1910, it was obliged to and did borrow $1,500.00 from one W. H. Shearman with which to pay for the annual assessment labor performed upon the mining claims owned by it, and that to secure the payment of said money so borrowed it executed a mortgage to the said Shearman upon all of its property and assets except the Copper Hill group, and denies that said mortgage included said Copper Hill group of mining claims; admits that said mortgage is unpaid, but denies

that the same is due, and on the contrary this defendant states that the time of the payment of said promissory note for which said mortgage was given as security has been extended by said Shearman, and this defendant states that its assets are of sufficient value to enable it to borrow sums of money far in excess of the amount due upon said promissory note, and in addition thereto all debts due and owing by said defendant with which to liquidate its present indebtedness. This defendant admits that all money realized by it from the sale of its capital stock has been expended in the payment of obligations which were just and due, together with the payment of certain and all fees and allowances to its officers and board of directors, but this defendant alleges that all of said fees and allowances were legal and just claims against said corporation.

7. This defendant denies that owing to the undeveloped condition of the property of the defendant, or to the encumbrances thereon, or to the impecunious condition of the defendant, or by reason of any other matter or thing whatsoever, the number of shares of stock now remaining in the treasury of said corporation has no market value, or that nothing can be realized thereon, but, on the contrary, this defendant states that said treasury stock is of a value in excess of fifty cents per share, and that said treasury stock and all of the same could have been sold by said defendant and would have

been sold by it had it not been for the wrongful acts of this plaintiff as hereinafter alleged.

8. Defendant admits that the assessment labor for the year 1911 has not yet been performed and that the defendant company has no money in its treasury with which to pay the same; but this defendant alleges that it is now making arrangements to and will cause the annual assessment labor for the year 1911 to be commenced in the immediate future and performed as by law required, and that it can and will procure funds through the sale of its treasury stock, or by other legitimate means, wherewith to pay for and liquidate all expenses incurred in the performance of said labor.

9. This defendant denies that there are many or any obligation of said corporation now due and owing by it to various or any creditors, except this defendant states that there are obligations now contracted for which it is liable in the sum of about $8,297.75, and no more. This defendant denies that it is in imminent or any danger of having instituted a multiplicity or any suits against it or of having its property and assets or any of the same dissipated. Denies that its officers or agents, either with or without authority, acknowledged openly or repeatedly or at all that it was insolvent, and, on the contrary, this defendant alleges that it is not insolvent, and denies that said mortgage is about to be foreclosed upon said property, and denies that in the event of such foreclosure all

or any of the assets of said defendant corporation would be sold for the payment thereof or that the unsecured creditors would be left without recourse for the payment of their claims, but, on the contrary, this defendant alleges that it has sufficient assets with which to pay all of its liabilities, and this defendant denies that it is insolvent or in imminent or any danger of insolvency.

10. This defendant denies that it has never been a going concern in any proper sense thereof as defined and specified in its articles of incorporation, and, on the contrary, alleges that it has transacted such business as it deemed proper and to the best interests of said corporation and its stockholders, and that any delay or interruption in the transaction of its business affairs has been caused through the wrongful acts of said plaintiff as hereinafter set forth, and this defendant denies that from its beginning the only business that it was transacting was to do the necessary assessment work upon its mining prospects for the years 1909 and 1910 and to attempt to sell its treasury stock and make application of the proceeds thereon, but, on the contrary, this defendant alleges that it has transacted all business which its board of directors deemed for the best interests of itself and its stockholders.

11. This defendant admits that the members of the present board of directors, together with those whom they represent as proxy for the purpose of voting at the annual stockholders' meeting or adjournments thereof, hold

a majority of the capital stock of the defendant company, but denies that they have held such control since the incorporation thereof or for any purpose except for the annual stockholders' meeting provided to be held in the year 1911 and the adjournments thereof. And this defendant denies that the affairs of said company, or any of the same, have been grossly or at all mismanaged, in that beginning two months after the incorporation of said company it contracted to and did pay so long as it had funds to its directors or certain other officers or agents a stipulated monthly salary, notwithstanding the fact that said board of directors, officers and agents performed little or no service for said defendant company, or in that in the sale of said 300,000 shares of the treasury stock as alleged in plaintiffs' complaint or any of the same, it paid grossly or any inadequate commissions either to those who were then upon the board of directors or to others who held large or controlling interests in said company, or in that in making on March 15, 1910, with one Peyton B. Locker or with one John Janney a contract for the sale of all of the treasury stock of said defendant company, or that in the making no provision for the payment of the mortgage alleged by said plaintiff to be due and owing upon said property, or in that having made no provision whatever for the payment of any of the just obligations due and owing by said defendant as alleged in said plaintiff's complaint and not keeping adequate books of account showing the financial

transactions of the defendant company as alleged in plaintiff's complaint, but, on the contrary, this defendant states that all monthly salaries paid by it to its board of directors and other officers and agents were paid and received in pursuance of resolutions of its board of directors theretofore duly adopted at meetings thereof duly called and held, and that each and every of said payments were made for services actually performed by the parties to whom the same were paid, and denies that said payment or any of the same were made for little or no service performed by the parties to whom the same were paid; and this defendant further states that said payments and each of them were made by officers and directors of this corporation who have ceased to be such for more than one year last past, and none of the present officers or directors of said corporation participated either in the making of such payments or in the receipt thereof, except that the present board of directors have caused to be made a payment of $200.00 to John Janney, the present Secretary of said corporation, to apply upon account for services performed by him as secretary of said corporation. And this defendant further states that all of its treasury stock heretofore sold has realized to this corporation in cash all that its said stock was reasonably worth to this corporation at the time of the contracting for the sale hereof, and that none of the parties selling any of the same have on behalf of this corporation received grossly or inadequate commissions

for the sale thereof, and that none of said commissions were ever paid to members of its board of directors or officers or to any other party or parties who held controlling stock interests in said company, or in any way dominated its business affairs or its board of directors.

12. This defendant further states that in the month of March, 1910, Peyton B. Locker was a stockholder in said defendant corporation to the amount of 61,618 shares and no more, so far as shown by the books of this defendant, and this defendant has no knowledge as to whether or not said Peyton B. Locker at said time owned any other or further shares of stock and therefore denies the same, and this defendant admits that the said John Janney was at the date of the execution of said contract by it to the said Peyton B. Locker, the secretary of said defendant, and admits that it entered into a contract with the said Peyton B. Locker in the month of March, 1910, for the sale of certain of its treasury stock, but denies that said contract was for the sale of all its treasury stock or any amount thereof in excess of 450,000 shares, and denies that the sale of said treasury stock under said contract promised to yield to the company no returns whatever, but, on the contrary, defendant alleges that said contract, if performed according to its terms of necessity, would have furnished to said defendant the reasonable value of the stock which it contracted to sell, and this defendant states that said contract was

in writing, a copy thereof being hereto attached, marked Exhibit I and made a part of this answer. This defendant admits that it has not procured funds wherewith to pay the promissory note secured by the mortgage given to the said W. H. Shearman, but alleges that it has sufficient assets wherewith to procure funds with which to liquidate said indebtedness in the event it fails to sell sufficient of its treasury stock for that purpose before demand is made for the payment of said promissory note, and this defendant further states that had it not been for the wrongful acts of said plaintiff as hereinafter related, said defendant would have procured from the sale of its treasury stock a sum of money far in excess of that needed for the payment of said mortgage, as well also as for the payment of all other just obligations due and owing or to become due and owing by it, and this defendant denies that it has not kept adequate books of account showing the financial transactions of said defendant company, but, on the contrary this defendant states that it has kept all such books of account as its officers and directors deemed necessary and sufficient for the purpose of keeping informed as to its business transactions.

13. This defendant denies that owing to its insolvency as alleged in said plaintiff's complaint or of its mismanagement, or by reason of any other matter or thing whatsoever, plaintiff has no plain, speedy or adequate remedy at law.

14. And for further answer to plaintiff's complaint, this defendant states that on the 22d day of March, 1910, it entered into a contract in writing with Peyton B. Locker, otherwise known as P. B. Locker, a copy of which is attached to this answer as Exhibit 1; that immediately thereafter the said P. B. Locker entered into an active campaign for the purpose of selling the treasury stock of this defendant corporation under the provisions of said contract and diligently pursued performance under said contract down to the time when said plaintiff instituted proceedings in this court against this defendant corporation as hereinafter alleged, and in so doing expended large sums of money and procured parties who were able, ready and willing to pay to this corporation the sum of fifty cents per share net for more than 40,000 shares of its said treasury stock, and this defendant is informed and believes, and therefore alleges the fact to be, that said parties are still ready, able and willing to purchase large blocks of said treasury stock at said price when the sale of said stock can be made by this defendant without any question pending in the courts as to the right of said corporation to sell the same under the provisions of said contract Exhibit 1 hereto attached, or as to the solvency of said corporation.

15. That on the 29th day of May, 1911, this plaintiff filed in this court an action wherein he was complainant and this defendant corporation was defendant, a copy of which said complaint is hereto attached, marked Exhibit 2 and made a part of this answer; that said suit

continued to pend in said court from the date of its filing to the second day of October, 1911, at which time an order was entered, dismissing said bill of complaint upon the application of said plaintiff; that said defendant believing that the issues presented by said complainant presented a question as to the right of this corporation to sell its treasury stock or any of the same under the provisions of said contract between this defendant and said P. B. Locker, refused to sell any of its said treasury stock until the issues presented by said bill of complaint were disposed of and the parties procured by the said P. B. Locker under the provisions of his said contract who were able, ready and willing to purchase shares of stock before the filing of said complaint, refused to purchase any of the same until such time as the issues of said complaint were disposed of.

16. That immediately after dismissing said bill of complaint set forth in Exhibit 2 here to attached, said plaintiff caused to be filed a bill of complaint in this action now pending between plaintiff and defendant, and that by reason of the bringing and prosecution of said suits and not otherwise, this defendant has been unable to sell sufficient of its treasury stock with which to pay its present indebtedness, and this defendant further states that about the time of its incorporation it caused the workings in its said mining properties to be thoroughly examined by mining engineers and a report to be made by them as to the ore reserves and deposits con-

tained in said properties and exposed by the workings thereon, to the end that it might adopt a policy in handling the ore deposits in said properties best calculated to further the interests of said corporation and its stockholders; that said mining engineers recommended that a mill or smelter be erected to treat and reduce the ores containd in said properties and that by so treating and reducing said ores the same could be done at a substantial profit to said corporation, while said ores could not be shipped to a smelter and the costs and expenses of transportation paid without concentration or reduction at a profit, and upon investigation this defendant discovered that it had large and substantial deposits of ore developed from which substantial profits could be procured by treating and reducing the ores at the property and shipping the concentrates or matte therefrom, but that profit could not be procured from the shipment of said ores in their crude state, and thereupon it decided to sell sufficient of its treasury stock with which to create funds for the construction of a smelting plant or concentrating mill at or near its property for the reduction and treatment of the ores therein contained, and the said contract with the said P. B. Locker, a copy of which is attached to this answer, as Exhibit 1, was entered into by this defendant in an endeavor to sell sufficient of its treasury stock to create the necessary funds with which to construct such smelter or mill, and had it not been for the bringing and prosecution of said suits by said plaintiff as hereinabove

set forth, said defendant would have sold sufficient of its treasury stock at the reasonable value thereof with which to have created funds for the construction of said smelter or mill, and this defendant is informed and believes, and therefore alleges the fact to be, that it could now and can in the immediate future sell sufficient of its treasury stock with which to construct and operate a smelter or mill for the reduction of the ores in its said properties when its right under the provisions of said contract with P. B. Locker to sell said treasury stock is no longer being litigated in court.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by said bill charged, without this, that there is any other matter, cause or thing in said plaintiff's said bill of complaint contained material or necessary for this defendant to make answer to and not herein or hereby well and sufficiently answered, confessed, traversed, avoided or denied, is true to the knowledge or belief of this defendant, all of which matters and things this defendant is ready and willing to aver, maintain and prove as *to* this Honorable Court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

TENABO MINING & SMELTING CO.

(Seal) By JOHN JANNEY,
Its Secretary.

H. C. EDWARDS,
Counsel for Defendant.

EXHIBIT 1 (TO ANSWER—AGREEMENT DATED MARCH 22, 1910, TENABO MINING & SMELTING CO.—P. B. LOCKER.

THIS AGREEMENT made and executed this 22nd day of March, 1910, by and between Tenabo Mining & Smelting Company, a Nevada corporation, hereafter called the Company, and P. B. Locker of Salt Lake City, Utah, hereinafter called the Agent, witnesseth:

WHEREAS, the Company has four hundred and fifty thousand shares of its capital stock remaining in its treasury with which to provide funds for the development and operation of its properties, and the erection of reduction plants, and,

WHEREAS said P. B. Locker is desirous of undertaking the sale of said stock and represents and believes that he can sell a portion of this stock in France or elsewhere, provided the necessary authority be given him to negotiate and execute a contract on behalf of the Company and to list the stock upon a French Banking Market, or other markets;

NOW, THEREFORE, for and in consideration of the mutual obligations herein imposed and the sum of one dollar interchangeably paid, the said P. B. Locker agrees and undertakes to provide and furnish all the fees and expenses for the listing of each one hundred fifty thousand shares of stock provided for in a Special Power of Attorney set forth in the Minutes of the Company, and

all other expenses required by the law of France or elsewhere, and all trustee's fees and expense, and he further agrees at his own expense to go to Paris in the interest of this Company and use diligent effort to negotiate said contract.

In consideration thereof the Company hereby appoints said P. B. Locker its agent and attorney in fact under a special power of attorney hereinafter referred to dispose of four hundred fifty thousand shares of its capital stock now remaining in the treasury, and the Company agrees to duly authorize said P. B. Locker by special power of attorney to make and execute on behalf of the Company, a contract in terms and effect as set out in the said special power of attorney.

The company further agrees that should said P. B. Locker successfully negotiate said contract, it will pay to the said P. B. Locker for his services from the moneys realized from the sale of said stock, but not otherwise, all in excess of the sum of fifty cents per share, said compensation to said Locker being conditional not only upon the negotiation of said contract, but upon the receipt by the Company of the purchase price of said stock.

It is mutually agreed that the entire amount of money received from the sale of said stock shall be deposited to the credit of the Company upon the delivery of certificates of stock.

It is expressly understood and agreed that the Com-

pany shall in no way be liable for any fees or expenses for the listing of said stock, or trustees fees and expenses, or any other expenses whatsoever, and that each and every share of stock so sold shall net the Company fifty cents per share.

From the first money received from the sale of stock, the Company shall pay the said Locker the first fifteen thousand dollars advanced to pay taxes and dues for listing the stock on the French market and the three thousand dollars fees to the Trust Company. The Company shall, however, be reimbursed said amounts from the moneys received from the sales in excess of said amounts before said Locker shall be entitled to any compensation, the intention being that each and every share of stock sold shall net the company fifty cents per share. Should the sale of stock be not sufficient to net the company fifty cents per share, the said Locker agrees to reimburse the Company in stock out of his personal stock in an amount equal to the amount taken from the treasury and for which the Company has not received fifty cents net per share.

The time allowed said Locker for the carrying out of this contract shall be as follows:

Sixty days within which to furnish satisfactory proof that the Company has entered in contractual relations with reliable persons whereby the sum of $15,000.00 will be furnished to the agent as needed for listing. Then

ninety days to effect his negotiations in Paris or elsewhere and procure the execution of a satisfactory contract as set out in said special power of attorney, provided that in computing these periods of time, the months of June, July and August shall be excepted because of the summer season.

Nothing in this contract shall be construed to require the agent to sell any of the said stock in France, but on the contrary he may negotiate the sale of the said stock at any other place or places desired by him.

And thereupon the following decree was entered:

DECREE.

This cause came on regularly to be heard and was argued by counsel for the respective parties, and upon consideration thereof, it was ORDERED, ADJUDGED AND DECREED:

I.

That J. P. Raine, of Pine Valley, State of Nevada, be and he is hereby appointed receiver of the Tenabo Mining & Smelting Company, defendant herein, a corporation organized under and pursuant to the laws of the State of Nevada, and said receiver is hereby authorized and directed forthwith to take possession of all of the real and personal property of said corporation located within the State of Nevada, including all books,

papers and documents of every name, nature and description, and particularly the following mining claims: Little Gem, Ollie, Reno, Winnemucca, Two Widows, Two Widows Extension, Copper Hill Group and Nevada Phoenix, together with all machinery, tools, appliances and other personal property located upon or used in connection with said mining claims, all of which said property is located in Lander County, State of Nevada.

II.

To examine, or cause the books and records of the defendant Tenabo Mining & Smelting Company to be examined, and from said books and from such other sources of information as may be available, to ascertain

(a) The authorized capitalization of said corporation, the number of shares issued and outstanding on the first day of October, 1912, and the number of shares in the treasury of said corporation on said date; also whether or not stock has been issued and sold by the officers and agents of said corporation since said date, and if so, to whom and for what consideration.

(b) To ascertain from said books and otherwise the money on hand on the 1st day of October, 1912, if any, and the nature and amount of the indebtedness of said corporation, to whom and when payable, and whether in money or in stock of said corporation, also whether or not any indebtedness has been incurred by the officers

and agents of said corporation since the 1st day of October, 1912; and if so, the nature, amount and consideration of said indebtedness.

III.

To sell for cash at public sale all of the real and personal property of said corporation, and particularly the following mining claims located in Lander County, State of Nevada, to-wit Little Gem, Ollie, Reno, Winnemucca, Two Widows, Two Widows Extension, Copper Hill Group and Nevada Phoenix, together with all machinery, tools, and appliances, and all other property owned by said corporation and located in the State of Nevada, said sale to be made upon said premises at Tenabo in Lander County, State of Nevada, it appearing to the court that it is best to sell the said personal property in the manner hereinabove specified, provided that said receiver shall first gave notice of said sale by publication thereof for at least once a week for four weeks prior to said sale, in a newspaper printed, regularly issued, and having a general circulation in Lander County, State of Nevada, if any such there be; and if there be no such newspaper published in said Lander County; or if the receiver in his discretion shall consider some other paper more advantageous, then the publication shall be in such paper so specified or selected, and having a general circulation in the State of Nevada, and said notice shall specifically describe the real and personal property to be sold. Pro-

vided, that said property shall not be advertised for sale, nor sold, until after the lapse of ninety (90) days from date hereof; nor until the further order of the court fixing the time of sale, and other conditions, if any, that the court may deem proper.

IV.

Said receiver is hereby directed to give notice to all creditors by publishing such notice in the ———, once a week for four consecutive weeks, directing all creditors to file their verified claims with the receiver at an address to be specfied, within (90) days from the date of the first publication of such notice; and that all claims not so filed shall be barred; and shall likewise mail a copy of said notice to each known creditor, provided that before the presentation of any claims for the approval of this court, notice thereof, with a list of such claims, shall be served upon the attorneys of record herein.

V.

Said receiver is hereby directed to keep a complete record of his doings in the premises, including an inventory of all property received, held, or sold; all money expended and debts incurred, and at the earliest practicable date report fully to this court the exact status and condition of the affairs of said corporation, and of his administration thereof.

The said receiver is further directed to hold all cash received from any source, to be disbursed under the or-

ders of this court, for the payment of expenses of this receivership, including such reasonable allowances as solicitors' fees and expenses for bringing this action as the court may deem proper, and distribute the balance under the orders of this court.

VI.

That before entering upon the performance of his duties as such receiver, said J. P. Raine shall take an oath of office to faithfully perform and discharge his duties, and execute and deliver to the clerk of this court a good and sufficient undertaking, conditioned as provided by law, in the penal sum of $7,500.00, payable to the clerk of this court, the court hereby reserving the right to increase said bond at any time.

Dated this 14th day of February, A. D. 1914.

E. S. FARRINGTON,
District Judge.

By the issues in this case, it is admitted that the defendant corporation was organized with an authorized capital stock of $3,000,000.00, divided into 1,500,000 shares of the par value of $2.00 each, of which amount 300,000 shares were issued to the Tenabo Consolidated Mines Company, 450,000 shares issued to the Gem Consolidated Mining Company in payment for the purchase price of their mining claims, and that 750,000 shares of the capital stock of said company were placed in its treasury (9) and that immediately after the incorpora-

tion of said company it acquired title in exchange for the shares of stock transferred by it to the Tenabo Consolidated Mines Company and Gem Consolidated Mining Company to the Two Widows, Two Widows Extension, Copper Hill, Little Gem, Reno, Ollie and Winnemucca lode mining claims, situated in the Bullion Mining District, Lander County, Nevada, (10).

That during the months of November and December, 1908, and during the year 1909, said defendant company sold and disposed of 167,250 shares of its treasury stock and that no other stock has been sold from its treasury, and that it received from the sale of its said treasury stock $26,687.50, and that its only source of income has been from the sale of its treasury stock, and that said property has yielded no income (11) and that at the time when said corporation acquired the title to said mining claims there existed against one thereof a mortgage for $15,000.00 in favor of McCornick & Co. (10) and that proceedings had been instituted for the foreclosure of said mortgage on said mining claims before the conveyance of said mining claims to said defendant corporation (11). That before the sale under said foreclosure proceedings was had said defendant corporation paid the amount due upon said mortgage from funds in its treasury received from the sale of its treasury stock (12).

On the 13th day of December, 1910, said company borrowed the sum of $1,500.00 from one W. H. Shearman

with which to pay for the annual assessment labor performed upon said mining claims, and to secure the payment thereof, it executed a mortgage upon certain of its mining claims, and that the amount due upon said mortgage has not been paid. That all money realized by it from the sale of its capital stock has been expended in the payment of its obligations (12).

That Peyton B. Locker owns 61,618 shares of the stock of the defendant corporation, and that John Janney was the secretary of said defendant corporation in the month of March, 1910, (15) and that said defendant company had not procured funds wherewith to pay the Shearman mortgage (16).

The evidence in this case shows substantially the following facts:

That on the 5th day of February, 1910, John Janney, Benner X. Smith, E. O. Howard, W. Mont Ferry and John Pingree were elected irectors of said defendant corporation (198-199-200) and these directors continued to serve as such at all times mentioned in plaintiff's complaint. (51).

That on the 22nd day of March, 1910, said defendant corporation entered into a contract with Peyton B. Locker wherein said Locker was appointed as attorney for said company to dispose of 450,000 shares of its capital stock remaining in its treasury, and said contract provided that: Whereas said Locker represented and be-

lieved that he could sell a portion of said stock in France and elsewhere provided the necessary authority be given him to negotiate and execute a contract on behalf of the company, and to list the stock upon the French banking market, that if the said Locker successfully negotiated said contract the company would pay to him for his services from moneys realized from the sale of said stock and not otherwise all sums in excess of 50 cents per share; said compensation to the said Locker to be conditional not only upon the negotiation of said contract, but upon the receipt of the purchase price of the stock, and that said company should in no way be liable for any fees or expenses for the listing of said stock, or trustee's fees or expenses, or any other expenses whatsoever; that from the first money received from the sale of stock the company would pay to said Locker $15,000.00 advanced to pay taxes and dues for listing said stock on the French market, and $3,000.00 fees to the trust company, but that the company should be reimbursed said amounts from the money received from sales in excess of said amount before the said Locker should be entitled to any compensation, and that the said Locker was to have the following time for carrying out said contract; sixty days within which to furnish satisfactory proof that the company had entered into contractual relations with reliable persons whereby the sum of $15,000.00 would be furnished the agent for listing and ninety days to effect his negotiations in Paris or elsewhere (20) and procure the execu-

tion of said contract as set out in said special power of attorney. That thereupon said company entered into a contract with the Windsor Trust Company whereby said trust company agreed that upon the depositing with it of certain certificates of stock in said defendant corporation for not less than 450,000 shares of its capital stock, with the transfers endorsed thereon or annexed thereto, said trust company would act as trustee and would issue in exchange therefor and deliver, pursuant to the order of the board of directors, stock trustee's certificates with dividend coupons annexed thereto for a number of shares equal to the number of shares of stock deposited with said trust company; that said trustee's certificates were to the effect that the bearer thereof, upon the surrender of said certificates and the unpaid dividend coupons issued on account thereof, is entitled to a certificate (for a like number of shares) at two dollars each of the capital stock of the Tenabo Mining & Smelting Company, the same having been deposited with said trust company for the bearer of said trustee certificates, and providing further for the payment of dividends to the representative of the holder of said certificate as in said trustee's certificate provided (242). That 450,000 shares of the stock of the defendant company referred to in the contract with Locker were deposited with said trust company (121).

Mr. E. O. Howard, cashier of Walker Brothers Bank, of Salt Lake City, Utah, the treasurer of said defendant

corporation, testified that on November 17, 1910, Walker Brothers Bank, of which he was cashier, received between $2,900.00 and $3,000.00 as a telegraphic transfer paid through the Utah National Bank under instructions from their New York correspondent, and that it was received from Mr. Locker (104); that said money was disbursed in taking care of the business affairs of said corporation (110-114).

Numerous letters passed between P. B. Locker and John Janney (256, 259, 261, 265, 267, 271, 272, 282, 283, 286, 289, 295), and numerous letters also passed between said Locker and the defendant corporation (266, 275, 280, 295, 296), and also letters were written by Andre L. Picard to John Janney (301), and one written by J. Coleman to Andre Picard (301), and from said letters it appears that Mr. Locker had expended a great deal of money in complying with the laws of France in reference to the sale of mining stocks in that country, a detailed statement of which appears at pages 277 and 278 of the record which shows that said expenses aggregated 78,-045.61 franks. That Locker had entered into a contract with French banking institutions in reference to the sale of said trustee's certificates on the basis of two dollars per share and that the sale under said arrangement was about to be consummated when this action was instituted.

Numerous meetings of the directors of said corporation were held after the 5th day of February, 1910, the

minutes of said meetings appearing in the record on pages 199, 201, 206, 213, 219, 220, 221, 222, 227, 228, 229, 230, 231, 232, 233 and 234, from which it appears that said directors had many meetings in which they were transacting the business of the corporation and from said minutes it also appears that said board of directors gave much consideration to its contract with said Locker for the sale of shares of stock of said company, and that they refused to permit Mr. Locker to transact any business in reference to the sale of said shares of stock which could in any way prejudicially affect the interests of the corporation.

The evidence further shows that on the 5th day of March, 1910, the directors adopted a resolution to the effect that each of them be allowed compensation of $50.00 per month (52) and that between March 8, 1910 and May 15, 1911, said five directors received in cash upon said compensation, $1,700.00 (60).

It appears from the testimony of Mr. MacVichie that he made an examination of the property of the defendant corporation and that he estimated 7,783 tons of straight smelting ore in sight and figuring copper at twelve cents and silver at fifty-six cents per ounce would give a net value of $13.38 per ton (153) and that he also found 17,257 tons of concentrating ore of a net value of $75,240.00, making a total net value of $186,770.00 and that the cost of erecting proper concentrating mill and matting plant would be $55,000.00 leaving a profit on the present avail-

able ore of $131,770.00 (154). That the claims he examined were the Little Gem, four lodes, of 70 acres, Nevada Phoenix, three lodes, 52 acres, Two Widows group and Fraction, 22 acres; that the workings of the mines consisted of a shaft to the depth of 375 feet and six levels, certain up-raises and two stopes (152) and that all of the levels showed a well defined vein of merchantable sulphide ore; that at the time he examined the property he considered that twice the amount of ore in sight was capable of being obtained; that the prospective value of the Gem and Phoenix was very attractive, above the ordinary.

Mr. Alfred E. Raleigh testified that he supervised the opening up of the Gem claim; that there is a fissure vein on the claim and that it appears on the surface and can be traced for 500 feet and that he discovered the ore shoot in the vein which runs from 5 feet at the surface to 14 feet at the bottom and he followed the vein down on its entire depth with good walls. (162).

The evidence of Mr. E. O. Howard, the treasurer of the company, shows that the indebtedness at the time of the bringing of this action was approximately $8,297.75 (106).

A list of the stockholders of the defendant company (page 337), shows that John Janney was a large stockholder in the defendant corporation. Mr. Janney testified that he had all of the vouchers for receipts and disbursements of said company, some of which had not been writ-

ten up on the books of the company due to the fact that he had made a trip east. (50).

ASSIGNMENTS OF ERROR.

The defendant relies in this appeal upon the following assignments of error:

The interlocutory decree entered in this cause on the 14th day of February, 1914, is erroneous and against the rights of the defendant for the following reasons:

1. Because it appears from the record in this cause that the defendant corporation was not at the time said interlocutory order or decree was made and entered, insolvent.

2. Because it appears from the record in this cause that the interlocutory decree made and entered by the court in this cause on the 14th day of February, 1914, appointing a receiver, is the only decree which has been made in said cause, and that by said interlocutory decree said receiver is ordered to forthwith take possession of all of the real and personal property of said corporation and sell the same for cash at public sale, and to keep a complete and accurate record of all of his doings, including an inventory of all property received and held or sold, all moneys expended and debts incurred, and at the earliest practicable time report fully to said court the exact status and condition of the affairs of said corporation and

of his administration thereof, and that no decree has been made or entered by said court adjudicating the right of said complainant to have the defendant corporation dissolved or its affairs wound up.

3. Because it appears from the record in this cause that said action was tried upon its merits and submitted to the court for final adjudication, and the evidence shows that said corporation was not insolvent and that complainant was not entitled to have the decree made or entered dissolving said corporation and winding up its affairs.

4. Because it appears from the record in this cause that the complainant was not entitled to have the property of said defendant corporation sold under a receivership unless said corporation was dissolved or its affairs wound up, and the evidence in said cause showed that said plaintiff was not entitled to have a final or any decree entered dissolving said corporation or winding up its affairs.

5. Because the evidence in said cause showed that the said complainant was not entitled to have a decree of said court made or entered granting the prayer of his bill or any part thereof.

ARGUMENT.

The appellant in this cause will discuss the assignments of error in the order in which they are specified above.

1. The appellant contends that the decree made and entered in this cause is an interlocutory decree, and not a final one, because it does not finally dispose of all questions presented for decision in the cause; in fact it disposes of none of the issues in the case as framed by the pleadings, and it is uniformly held that a decree is only final when it disposes of all of the questions presented for decision in a cause and gives all of the relief which under the pleadings and proof the parties are entitled to.

Words & Phrases, Vol. 3, page 2774 to 2787.

The evidence in this case as set forth in the statement of fact in this brief shows that the assets of the defendant corporation consisted of numerous mining claims situated in Lander County, Nevada, and of more than 450,000 shares of treasury stock which was being sold in France for more than two dollars per share, and the sale of which the plaintiff is seeking to prevent in this action, and that in said mining claims there was then developed ore of a net value of $131,770.00, while the total indebtedness of the corporation aggregated approximately $8,-297.75. And no evidence was introduced by the plaintiff in this case (upon whom the burden rested of showing

insolvency of the corporation) that said corporation was not able to provide funds wherewith to pay its debts as they matured, and it must be apparent from the magnitude of the assets of said corporation and of their character that the presumption must be indulged in that said corporation was in a position to provide all funds necessary to pay its indebtedness as it matured. It must, therefore, be conclusively apparent that this corporation was not insolvent, for insolvency in its general sense is a term used to denote the insufficiency of the entire property and assets of an individual or corporation to pay its debts.

Vol. 4 Words & Phrases, citations page 3647.

And even though insolvency should be construed to mean inadequacy of the corporation's funds to pay its debts in the usual course of business, yet there is absolutely no showing in the evidence that said corporation was not able to pay its debts in the usual course of business.

2. In discussing assignment of error No. 2 we call the court's attention to the fact that the decree in said cause (65) appointed a receiver of all of the property of the defendant corporation with instructions to make a report to the court of the number of shares of stock of said corporation issued and outstanding on the 1st day of October, 1912, the number of shares in the treasury of said corporation on said date, whether or not stock has been issued and sold by the officers and agents of said

corporation since said date, and if so, to whom, and for what consideration; the money on hand on the first of October, 1912, the nature and amount of indebtedness of the corporation and to whom and when payable, and whether in money or stock of said corporation; whether or not any indebtedness has been incurred by the officers and agents of the company since the first of October, 1912, and if so the nature, amount and consideration of said indebtedness; TO SELL FOR CASH AT PUBLIC SALE ALL OF THE REAL AND PERSONAL PROPERTY OF SAID DEFENDANT CORPORTION. Then instructing the receiver in the manner in which said sale shall be made and then directing said receiver to keep a complete record of his doings and an inventory of all property received, held or sold, and of money expenses and debts incurred and to report fully to the court the exact status and conditions of the affairs of said corporation and of the administration thereof and directed the receiver to hold all cash received from any sources to be disbursed under the order of the court for the payment of expenses of the receivership, including such reasonable allowance as solicitor's fees for the bringing of this action as the court may deem proper and distribute the balance under the order of the court.

The court's attention is called to the fact that this decree does not adjudicate one single issue raised by the pleadings in the case, and nowhere in said decree is it

found or adjudicated that there is any emergency creating a condition of immediate necessity for the sale of said property or any of the same. Appellant contends that while an order for the sale of property in the hands of a receiver is one resting in the sound judicial discretion of the court, that the same is not arbitrary, but impartial to be exercised in obedience with the rules of law, and it is not proper to order a sale and distribution at a preliminary state of the suit when the cause has not been determined on its merits unless the evidence shows some emergency creating a condition of immediate necessity, and especially is this true where such sale depends upon the determination of an issue of fact raised by the pleadings which is properly the subject of final judgment in the case.

34 Cyc., page 310-311 and citations to said text.

We therefore contend that the decree ordering the receiver to sell all of the property of said defendant corporation was erroneous because the rights of the parties to the suit have not been finally determined and the court would have no right to sell the property of said corporation except it adjudicate that conditions existed which required the winding up of the corporation, and this has not been done, nor is there any finding or adjudication in the decree that the facts existed which would justify the court in winding up the affairs of the corporation, and we submit that if this interlocutory decree is permitted to

stand and the receiver by reason thereof makes a sale of all of the property and assets of the corporation before the final decree is entered when no showing is made of any emergency creating a condition of immediate necessity for such sale, that then upon the entering of a final decree adjudicating the rights of the parties upon the issues and pleadings as framed, if it should be adjudicated by the trial court that the corporation should be wound up and an appeal from such final decree were made and the appellate court should reverse the decree of the trial court and should hold that the evidence in the case did not justify the winding up of the corporation, then the corporation would of necessity be destroyed because its assets the character of which it needed in the conduct of its business had been disposed of and converted into cash.

3. We will discuss assignments of error Nos. 3, 4 and 5, together as the errors complained of are to a greater or less extent so interwoven as to make the discussion of all of the same together.

The plaintiff was only entitled to have a receiver appointed under the issues in his case if the defendant corporation was insolvent, or if the directors of said corporation had so fraudulently or otherwise mismanaged or threatened to fraudulently or otherwise mismanage the affairs of said corporation as to cause the stockholders thereof, including the plaintiff, to sustain injury or damage.

The only acts of mismanagement shown by the evidence in the case as above outlined in the statement of facts are, first, that the directors of said corporation had passed a resolution providing for the payment of $50.00 per month to each of them for services performed as such directors and by using the funds in the treasury of the corporation for the payment of a part of the monthly compensation provided for in said resolution, and second, that said board of directors had entered into a contract with P. B. Locker whereby Locker was permitted at his own expense to promote the sale of a large block of the treasury stock of the defendant corporation in France or elsewhere, and that the sale of said stock was to net the corporation 50 cents per share, and that Mr. Locker as reimbursement for expenses incurred by him and by way of commissions for services performed in the making of such sales was to receive all sums derived from such sales in excess of 50 cents per share; and the court's attention is called to the fact from the resolutions of the board of directors, that they considered that 50 cents per share was the reasonable net value of said stock to the corporation and nothing appears in the evidence from which it can be concluded that 50 cents a share was not a reasonable sum for said company to realize upon said stock.

The plaintiff in this case complains that the contract between the company and Locker was upon a basis that promised to yield to the company no returns. We submit that his proof did not sustain this allegation, and

that had this suit not been instituted, a large sum of money would have been deposited in the treasury from the sale of said stock. It is contended by the plaintiff that the corporation was dormant and was not transacting the business for which it was incorporated, but the evidence shows that at the time the defendant corporation acquired the mining claims now owned by it that there was a large quantity of very valuable ore blocked out therein by reason of extensive development theretofore performed and that said corporation placed in its treasury a large block of stock to be disposed of by the directors for the purpose of creating funds with which to construct reduction plants for the reduction of the ores already developed in said properties. The evidence also shows that the meetings of the directors were numerous and that all of them showed energy on the part of the board in its campaign to dispose of the treasury stock of the company at a reasonable price to the end that the reduction works required could be erected to treat the ores in the mine.

The contract with Mr. Locker was nothing more or less than an option granted to him by the company by which he had the right to purchase shares of stock from the company at 50 cents each and the corporation had no control over the campaign which Mr. Locker saw fit to pursue in the disposition of said stock so long as the same was honestly conducted, and surely the court would not be justified in appointing a receiver to wind up the

affairs of a corporation because some party holding an option upon the treasury stock granted by the board of directors was pursuing a campaign for the sale of the same which resulted in the acquiring by said optionholder of a sum far in excess for said stock upon the sale thereof of the price which was received by the corporation, if as a matter of fact the corporation received the reasonable net value of the stock. And again we submit that there is not shown by the evidence in this case one element of bad faith on the part of the directors in the contractual relations with Mr. Locker and if any complaint exists at all, it is merely one of difference of opinion between the plaintiff and the board of directors as to business policies connected with the transaction of the business of the corporation. We therefore submit that the evidence in this case shows conclusively that there was no fraudulent or other mismanagement of the affairs of the corporation and that the acts of the directors could not in any way operate to the injury or damage of the plaintiff or any other stockholder.

It has been held that a receiver should not be appointed for a corporate property when the specific acts are capable of redress and complete restitution by other means.

34 Cyc., page 80.

And we submit that under the authorities it is clear that a court should not wind up the affairs of a solvent corporation in any event unless it is apparent from the

testimony introduced that the corporation is being so mismanaged that it is useless to further permit it to conduct its business, because by so doing the assets of the corporation will be lost to the stockholders and creditors, or that the directors of the corporation are so conducting its affairs as to be destructive of its welfare and the majority of the stock of the corporation is so owned or dominated by the wrong-doing directors that it is apparent that no change of the management can be procured through a change in the board of directors.

It has been well said that each case for the appointment of a receiver and the winding up of its affairs must stand upon its own particular circumstances and conditions, and therefore we deem it unnecessary to indulge in an extended citation of authorities, but it is likewise well settled that a court will not undertake to wind up the affairs of a corporation and distribute its assets among its creditors and stockholders unless such action is absolutely essential to protect the creditors and stockholders in case of insolvency or in case of fraudulent or other gross mismanagement of the corporation which is or will produce material injury to said creditors and stockholders unless remedied, and where the said directors control or dominate the voting power of said corporation.

The court's attention is called to the fact that in the record a bill of complaint appears commencing on page 22. This bill, however, while it appears to have been filed

on October 16, 1911, as a matter of fact is in Exhibit 2 attached to the original answer in the case at bar. The first suit was case No. 1164 and was dismissed prior to the bringing of the suit at bar.

In this connection the court's attention is called to the fact that this action is brought by Charles D. Bates individually as a stockholder of said corporation and not in behalf of himself and other stockholders, and that said plaintiff was the owner of only 200 shares of the capital stock of the defendant corporation (155); that he became the plaintiff in this suit by reason of being influenced so to do by one G. S. Kimball and by reason of representations by the said Kimball that if said suit was brought the said Kimball thought there would be a chance for the plaintiff to get the value of his stock out of it and that he (Kimball) would pay the expenses of the suit and the attorney's fees (156) and that so far as the list of stockholders is concerned it does not appear that the said Kimball was a stockholder of record in said corporation (238). That neither the directors whose acts are complained of nor any of the stockholders are represented in this suit, notwithstanding the fact that the interests and rights of every stockholder are involved in the subject matter thereof, and the court's attention is called to the further fact that said plaintiff made no attempt to have the directors cancel said contract nor did he make any attempt to seek a remedy within said corporation by calling upon

the stockholders as required under Rule 94 of the Rules in Equity; and we submit that said decree is erroneous in the particulars assigned.

The court's attention will undoubtedly be attracted by complaints made by said plaintiff in reference to the acts of a board of directors holding office prior to February 5, 1910, but we do not feel inclined to take up the time of the court in reviewing this testimony or the effect of the acts complained of, because they are not material or relevant to the issues in this case inasmuch as they are acts of a board of directors no longer in office and if any injury was sustained by reason of said acts the corporation had proper action against the several members of said board and in no event would plaintiff be entitled to any remedy by reason thereof other than the one of demanding of the directors that they bring proper action to preserve the interests and welfare of the corporation, and in the event of the failure of said board so to do, then the institution of a suit on behalf of himself and other stockholders representing the corporation to redress the wrongs complained of.

We submit that the decree of the trial court in this case should be reversed.

Respectfully submitted,

H. C. EDWARDS,
Counsel for Appellant.